

purpose of appealing under s 12(6) of the Act. The situation here is analogous to the appellants in *Re Gasbourne*¹⁵ having to defend actions which could not have been commenced but for the ex parte orders of the master.

The registrar has also submitted that the appeal has been filed outside the period of 28 days allowed by O 55 r 3(2) of the Rules of the Supreme Court 1970. In my view, and here I agree with the submission of counsel for the plaintiffs, the period of 28 days runs from the date on which notice of the decision is given to the appellant: see r 2(4) and *Minister of Labour v General Iron & Steel Co (Wollescote) Ltd*.¹⁶ In the present case, no notice of the decision has been given to the plaintiffs at all. The plaintiffs are accordingly not out of time in filing their appeal.

I turn now to the application of the second defendants. It was contended by counsel for the second defendants that (1) the plaintiffs' claim against the second defendants was for passing-off which was a claim in tort, and that the proper process was by writ of summons under O 5 r 2; and (2) O 55 had no application. This ground, in my view, is not relevant as the plaintiffs have not, in this appeal, sought a declaration that they have a proprietary interest in the name or that the second defendants have passed off their new name as that of the plaintiffs'. The submission of counsel for the plaintiffs was that (1) if the plaintiffs were to succeed in their appeal, they would be entitled to restrain the second defendants from using the new name on the ground that it would then be an offence for the second defendants to continue to use their new name in Singapore: see s 378(3) of the Act; and (2) by virtue of O 15 r 6(1), no cause shall be defeated by reason of a misjoinder.

In my view, there are two separate issues involved in the second defendants' application. The first is whether the second defendants may be joined as a party in an appeal under O 55 of the Rules against a decision of the registrar. The second issue is whether the plaintiffs are entitled to an injunction to restrain a breach of s 378(3) of the Act if they do not seek, as they have not done, to establish that they have a proprietary interest in the name. As regards the first issue, O 55 r 3 provides that notice of the originating motion must be served on all parties to the decision appealed against. The second defendants are a party to the decision of the registrar. They have been notified of the appeal by their inclusion as a defendant. This is not the same thing as providing that a party to a decision under appeal shall be a party to the appeal, but it is very close to it. No argument has been addressed to me on whether O 15 r 4(1) is applicable to this appeal.

As regards the second issue, it does not follow that if the second defendants were to contravene s 378(3) of the Act (assuming their new name were deregistered), the plaintiffs would be entitled to an injunction. The current state of the law is that unless the plaintiffs suffer a special

A damage, they may have no locus standi to sue for an injunction without joining the Attorney General: see Buckley J at p 114, *Boyce v Paddington BC*;¹⁷ see generally Sharpe, *Injunction and Specific Performance* paras 307-322. Neither counsel has addressed me on this point, presumably because this issue will be resolved at the hearing of the appeal.

B The second defendants' argument in support of their application was that the plaintiffs were in effect suing in tort for passing-off. This is not so, as is plain from the third prayer in the originating motion. The plaintiffs have not sought to establish a proprietary interest in their name. The second defendants' objection to the joinder on this ground therefore fails. I have also not been persuaded that there was a misjoinder of the second defendants in this appeal.

C For the above reasons, the applications of the registrar and the second defendants are dismissed with costs.

D *Applications dismissed.*

Solicitors: *Lee & Lee; Chor Pee & Co.*

Reported by *Mathavan Devadas*

E

Harold Shaw v Wong Phila Mae

HIGH COURT (SINGAPORE) — DIVORCE PETITION

NO 755 OF 1985

F YONG PUNG HOW J
31 OCTOBER 1989

Family Law — Custody — Application to vary custody order — Reluctance of court to order another change — Women's Charter (Cap 353, 1985 Ed), s 119

G *Civil Procedure — Application for adjournment to consider other party's affidavits — Court's discretion — Factors to be considered*

H The respondent sought an order that a previous order granting the petitioner sole legal custody of the children be varied to grant to the respondent sole legal custody, care and control of the children with reasonable access to the petitioner. The respondent's counsel, after referring briefly to the existence of a multiplicity of affidavits, sought an adjournment of the hearing on two grounds: that there were so many affidavits, and he would need more time to consider them; and that he had received letters the day before from two deponents to previous affidavits, as a result of which he would want time to file further affidavits.

Held, dismissing the respondent's application:

I (1) The first question was whether the court should grant an adjournment. The court has an inherent power to adjourn a hearing in order to do justice between the parties. Adjournment is a matter of discretion for a judge to exercise according to the facts and circumstances of each case.

(2) A court should decide whether the additional evidence which the applicant's counsel states will be the subject of these further affidavits would help the court materially in deciding on

the matter before it; if it could, a refusal to grant the adjournment might result in a decision which was based on incomplete evidence and to a possible injustice to the party who has been denied the opportunity. Sometimes, it might even be that an adjournment should be given just to enable the judge to decide first whether, on the evidence already available to him, further evidence would be necessary or desirable.

(3) The court was unhesitatingly of the view that, while the respondent's association with her present husband might be relevant, it was by no means the most relevant of the factors to be considered in deciding on the respondent's application.

(4) As such, the court could not see how an adjournment to file further affidavits about the respondent's present husband could add anything to help the court in deciding on the issue. The court therefore refused the application for an adjournment.

(5) The respondent had alleged that the children fear the petitioner, and the petitioner has himself admitted that he is a strict father, but no adverse or negative factors or characteristics of him have been disclosed. The respondent on the other hand stands out from the affidavits as a woman who loves her children dearly.

(6) The court had no doubt that nothing could be more harmful to the children concerned than its transferring their custody back to the respondent again, after it had only recently changed hands; and also that their welfare would be best served by allowing them to settle for some time back in Singapore. The court thus dismissed the respondent's application.

(7) The court was told that the respondent's immediate concern was only the question of access. The court directed counsel for both parties to try to sort this out; failing agreement, the parties would have liberty to apply.

[Editorial Note: The respondent has appealed to the Court of Appeal vide Civil Appeal No 106 of 1989.]

Legislation referred to

Women's Charter (Cap 353, 1985 Ed) s 119

*Harry Elias (Flexie Sion (Miss) with him) for the petitioner.
HE Cashin (S Selvaraj with him) for the respondent.*

Cur Adv Vult

Yong Pung How J: Summons-in-chambers 3951 of 1989 in Divorce Petition 755 of 1985 taken out by the respondent on 8 July 1989 came before me in chambers for hearing on 19 September 1989. The respondent sought the following order:

That the order made on 21 April 1989 granting the petitioner sole legal custody, care and control of the children, namely, Soo Mei, Soo Wei and Soo Xian be varied as follows:

That the respondent be granted sole legal custody, care and control of the children, namely, Soo Ling, Soo Mei, Soo Wei and Soo Xian with reasonable access to the petitioner.

On my dismissing the application, the respondent filed a notice of appeal on 20 October 1989 as to the custody of Soo Mei, Soo Wei and Soo Xian.

At the hearing before me on 19 September 1989, the respondent's counsel, Mr Cashin, after referring briefly

A to the existence of a multiplicity of affidavits, sought an adjournment of the hearing, on two grounds:

- (1) that there were so many affidavits, and he would need more time to consider them;
- (2) that he had received letters only the day before from a Jane Sage and a Pastor Coyle, two deponents to previous affidavits, as a result of which he would want time to file further affidavits.

B

Jane Sage was one of the two previous wives of a Steve Sage, the respondent's present husband, whose background and character had been referred to in very unflattering terms in affidavits by and on behalf of the petitioner.

C

Mr Cashin was really concerned therefore with his second ground, because he said, and I took this down verbatim:

D

If Steve Sage's character is shown to be as affirmed so far, I would immediately withdraw the application for custody. But further affidavits should show him to be a different person, and opportunity should be given for the respondent to present her case fully.

Later, in replying, he said:

E

Without further affidavits I would be the first to say that we should not have custody, with such a man as Steve Sage around the respondent. But with further affidavits we should be able to give a completely different impression of him.

Mr Elias, for the petitioner, objected to any adjournment. He contended that any further evidence by Jane Sage was irrelevant, because the United States court records which were already before the court could not be contradicted, and any further affidavits after an adjournment could not change a situation which had already crystallized. Additionally, he contended that any adjournment would have the effect of preventing the eldest daughter, Soo Ling, from giving evidence, because she had been admitted to Oxford University and would be going into residence there the following month.

F

G

The first question before me then was whether I should grant an adjournment. In divorce proceedings, as in other matters, the court has an inherent power to adjourn a hearing in order to do justice between the parties. Adjournment is a judicial act, but it is a matter of discretion for a judge to exercise according to the facts and circumstances of each case. In considering an application for an adjournment to enable a party to file further affidavits, a court should decide whether the additional evidence which the applicant's counsel states will be the subject of these further affidavits would help the court materially in deciding on the matter before it: if it could, a refusal to grant the adjournment might result in a decision which was based on incomplete evidence and to a possible injustice to the party who has been denied the opportunity. Sometimes, it might even be that an ad-

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I

jourment should be given just to enable the judge to decide first whether, on the evidence already available to him, further evidence would be necessary or desirable. In this case, the matter being fixed for hearing on Tuesday 19 September 1989, the relevant files had been handed to me in the usual course before the preceding weekend, and I had had the opportunity to peruse them before the hearing. The material facts are set out below.

In this case, the parties were divorced in 1985, having lived apart for a continuous period of at least three years immediately preceding the presentation of the petition, and the respondent having consented to a decree being granted. There were five children of the marriage: Christopher Harold Shaw Chai Chian (son) born on 18 October 1967, Shaw Soo Ling (daughter) born on 3 September 1969, Shaw Soo Mei (daughter) born on 5 July 1972, Shaw Soo Wei (daughter) born on 26 February 1975, and Shaw Soo Xian (daughter) born on 5 October 1980. The decree nisi was granted on 24 September 1985 and was made absolute on 3 January 1986. Ancillary matters were settled by a deed of settlement dated 7 May 1985, particularly in relation to the children of the marriage, and the terms thereof were incorporated into an order of court dated 22 November 1985. Relevant to the application before me were certain paragraphs of this court order:

4 The petitioner and the respondent shall comply with the terms of a deed of settlement made between the petitioner and the respondent and dated 7 May 1985.

5 The petitioner and the respondent be granted joint legal custody of the said children with care and control of the said children to the respondent.

6 The petitioner be granted access to the said children during weekends, public holidays and school holidays and such other days as the petitioner may reasonably require.

7 The petitioner and the respondent shall make jointly all decisions concerning the education of the children save that the petitioner shall, after consultation with the respondent, have the final decision as to the choice of schools, colleges and universities.

8 Neither the petitioner nor the respondent shall take the children out of Singapore without the prior consent in writing of the other.

After the divorce proceedings, there appears from the affidavits to have been an uneasy and unreal truce between the petitioner and the respondent. This stemmed from their very different approaches to life, and was compounded by the strong religious views of the respondent, which surfaced in particular over the education of the children. The petitioner preferred his children to go to the best conventional schools, eg for the son Marlborough College, where he himself had been, and for the daughters, Ascham in Australia and the Singapore Chinese Girls' School in Singapore. The respondent equally firmly believed that they should be educated at Seventh Day Adventist schools, if not in the United States, then at least in Singapore. There had already been the seeds of misunderstanding and bitterness sown some years previously

A when the son was taken out from Marlborough College by the respondent only a few days after he entered it.

B The culmination of all this was that on or about 21 December 1988, the three younger daughters with the consent of the petitioner went to meet the respondent in Orlando, Florida and were to have returned to Singapore on or about 27 December 1988. As they had not returned by March 1989, the petitioner took out Summons-In-Chambers 1430 of 1989 on 16 March 1989 seeking an order:

- C (1) that cl 5 of the order of court made on 22 November 1985 be varied (so) that the petitioner be granted sole legal custody, care and control of the children;
(2) that cll 6, 7 and 8 of the order of court be set aside;
(3) that the respondent return the custody of Soo Mei, Soo Wei and Soo Xian to the jurisdiction and to the custody of the petitioner.

D In his supporting affidavit dated 17 March 1989 the petitioner alleged, inter alia, that the respondent had committed a breach of the order of court of 22 November 1985 in that, contrary to the terms of the order of court:

- E (1) the respondent had retained three of the children out of the jurisdiction without his consent, and seemed bent on keeping them out of the jurisdiction;
(2) she had taken it upon herself to decide on the education of the children against his wishes.

F In fact the petitioner contended that, in the custody of the respondent, the children had since December 1988 been wandering gypsy-like for several months through the United States without any settled address, and neglecting their education.

G On 21 April 1989, an order of court was made in terms of the petitioner's application by the High Court in Singapore. After obtaining the order of court on 21 April 1989, the petitioner took further legal proceedings in the United States courts, following which the three children were brought back by him to Singapore and put back into school.

H On 8 July 1989, the respondent took out Summons-In-Chambers 3951 of 1989 which came before me in chambers on 19 September 1989. It was supported by the respondent's affidavit (27 pages with 11 exhibits) dated 23 August 1989. Between that date and the date of the hearing, a period of less than four weeks, a further five affidavits were filed by her or on her behalf. In reply, the petitioner filed an affidavit (38 pages with 19 exhibits over 84 pages) on 12 September 1989 and followed this up with one further affidavit by him and six other affidavits on his behalf.

I So far as the application for adjournment by Mr Cashin was concerned, I was unhesitatingly of the view that, while the respondent's association with Mr Sage

might be relevant, it was by no means the most relevant of the factors to be considered in deciding on the respondent's application before me. Quite apart from any reference to Mr Sage and subject to any help which counsel might be able to give me in their submissions, there was already much more than sufficient evidence for me to consider the issue of custody. I could not see how an adjournment to file further affidavits about Mr Sage by a former wife of his, and by a Pastor Coyle, could add anything to help the court in deciding on the issue. I therefore refused the application for an adjournment.

Having refused the application for an adjournment, the remaining question before me was what I should do with the summons-in-chambers itself. In view of the stand which he had taken, Mr Cashin made no submission, and I could have dismissed it without further consideration. However, having had the opportunity to peruse the files, I considered as fully as I could the question of the custody of the children before disposing of the application. The principle to be followed by a Singapore court in such matters is set out in s 119 of the Women's Charter (Cap 353, 1985 Ed):

(1) The court may at any time by order place a child in the custody of his or her father or his or her mother or (where there are exceptional circumstances making it undesirable that the child be entrusted to either parent) of any other relative of the child or of any organization or association the objects of which include child welfare, or to any other suitable person.

(2) In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this, the court shall have regard

- (a) to the wishes of the parents of the child; and
- (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

The practical application of this principle is not always easy in matrimonial disputes where custody is fought for, and children are almost always the unfortunate objects of their parents' attention: more often than not, a court has to decide on a balance of various competing and conflicting considerations. In the present case, the respondent has alleged that the children fear the petitioner, and the petitioner has himself admitted that he is a strict father, but no adverse or negative factors or characteristics of him have been disclosed. The respondent, on the other hand, stands out from the affidavits as a woman who loves her children dearly, but in her own unconventional way, even to the extent of committing what was clearly a breach of the order of court which gave her care and control of the children. In the circumstances, even without further evidence, and even without the benefit of proper submissions from counsel, I had no doubt that nothing could be more harmful to the children concerned than my transferring their custody back to her again, after it had only recently changed hands; and also that their welfare would

A be best served by allowing them to settle for some time back in Singapore. Having regard to these considerations, I dismissed the respondent's application.

B I should add that I was told by Mr Cashin at the conclusion of the hearing that the respondent's immediate concern was only the question of access. It appeared to me that the most sensible decision I could make would be to direct counsel for both parties to try to sort this out; failing agreement, the parties would have liberty to apply.

Application dismissed.

C Solicitors: *Harry Elias & Partners; Murphy & Dunbar*

Reported by *Terence Tan Bian Chye*

D **Tan Thye Heng v Pan Mercantile (S) Pte Ltd & Anor**

HIGH COURT (SINGAPORE) — DISTRICT COURT APPEAL
NO 60 OF 1988
CHAO HICK TIN JC
9 OCTOBER 1989

E *Civil Procedure — Appeal to High Court — Notice of appeal served outside prescribed time — Whether extension of time to be granted by High Court or subordinate court — Subordinate Courts Rules 1986 O 3 r 5 & O 54 rr 1(1), (5), 2, 3(2) — Rules of the Supreme Court 1970, O 3 r 5 — Supreme Court of Judicature Act (Cap 322, 1985 Ed), ss 18(2)(h) & 27(1)*

F The appellant had filed a notice of appeal against a decision of a district judge. However, the notice of appeal was served out of time on the respondents. The appellant then appealed to the High Court for an extension of time. This was granted by the assistant registrar, whose decision was then appealed against to a judge-in-chambers by the respondents. Counsel for the appellant sought to argue that, based on O 54 r 3(2), the High Court automatically has jurisdiction over an appeal once the notice of appeal is filed. The appellant had also sought to use O 3 r 5 of the Rules of the Supreme Court 1970 to argue that the court could extend the time limits.

Held, allowing the respondents' appeal:

H (1) The first issue which the court was asked to address is, is there an appeal where the notice of appeal, though filed, was not served on the respondents within the prescribed time. In the light of O 54 of the Subordinate Courts Rules 1986, before there could be in existence an appeal, the notice of appeal must be both filed and served within the prescribed time. The meaning of appealing is 'giving notice to your adversary of your intention to appeal, by serving upon him a notice of appeal'. Since the notice of appeal was not served within time, there was accordingly no appeal in existence to the High Court.

I (2) Under O 3 r 5 of the Subordinate Courts Rules 1986 (the 'SCR'), the subordinate court is empowered to 'extend or abridge the period within which a person is required or authorized by these Rules ... to do any act in any proceedings'. The present application should have been made before the subordinate court in accordance with that Order.